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OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,
Petitioner,
v.
P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,
Respondent,
and
UNITED STATES OF AMERICA,
Intervenor-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE STATES OF MARYLAND, CONNECTICUT, MASSACHUSETTS, AND NEW YORK AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*, is a permissible exercise of Congress's power under Section 5 of the Fourteenth Amendment.

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BRIEF OF THE STATES OF MARYLAND, CONNECTICUT, MASSACHUSETTS, AND NEW YORK AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF *AMICI CURIAE*

The States of Maryland, Connecticut, Massachusetts, and New York, as *amici curiae*, urge the Court to affirm the decision below and to declare the Religious Freedom Restoration Act ("RFRA" or "the Act") constitutional as applied to the States. These *amici* strongly support both the Act and the goal that underlies it, namely, ensuring that governmental entities do not impose burdens on an individual's religious practice unnecessarily or without adequate justification. Pursuing this goal is important to

amici as a matter of policy, not only because it promotes religious freedom generally, but also because it helps ensure that governmental entities do not, inadvertently or otherwise, cross the constitutional dividing line between laws that "prohibit[] the free exercise" of religion (U.S. Const. amend. I) and those that do not. Religion plays an important part in the lives of many citizens, and these *amici* wish to ensure that everyone within their respective States has a full opportunity to practice his or her religion freely, without undue government interference.

At the same time, these *amici*, like the States that have submitted a brief in support of the petitioner, recognize the potential implications of this case for state prerogatives and, more broadly, for the fundamental principles of federalism that govern the interplay between those prerogatives and the authority of the national government. Most obviously, a decision of this Court upholding the Act under a broad reading of Section 5 of the Fourteenth Amendment, such as the alternative rationale articulated in *Katzenbach* v. *Morgan*, 384 U.S. 641 (1996), would give the national government a broad license to intrude into areas that traditionally have been left—and should be left—to the States. On this fundamental issue, then, these *amici* States agree with those States that have chosen to oppose RFRA.

Unlike those States, however, these *amici* believe that RFRA can and should be upheld under a narrower reading of Section 5. The briefs of the respondent and certain of his *amici* have offered alternative interpretations that follow this approach. A decision upholding RFRA, therefore, need not and should not authorize Congress broadly to restrict the range of matters that are left to exclusive state control under our federal system.

On the narrower issue of whether RFRA itself will inevitably thwart the States' ability to carry out their penal, educational, and other core functions, these *amici*

respectfully disagree with the views expressed by the States that have filed in support of petitioner. In the view of *amici,* if RFRA is properly interpreted by this Court and by the lower courts (as it largely has been thus far), that landmark statute will not substantially burden the States' ability to carry out any of these core functions. The principal purpose of this brief is to explain why that is so.

SUMMARY OF ARGUMENT

Properly interpreted, RFRA does not and will not impede the States' ability to operate their prisons effectively. This Court has a long established history of providing significant deference to States in matters of prison administration. In light of that history, Congress would have had to express, clearly and unequivocally, its intention to deprive the States of that deference, if it had intended to do that by enacting RFRA. Yet, not only did Congress fail to express such an intention, it instead made clear through RFRA's language and legislative intent that courts should continue to afford deference to the States in matters of prison operation, and in particular, in determining what is necessary to achieve and maintain order, security, discipline and safety in the prisons. Indeed, Congress endorsed and agreed with the deference that courts had been giving to prison officials for years prior to RFRA, whether they applied the traditional compelling interest test or a more relaxed, rational-basis standard such as that adopted by this Court in *Turner* v. *Safley,* 482 U.S. 78 (1987), and *O'Lone* v. *Estate of Shabazz,* 482 U.S. 342 (1987).

It is therefore not surprising that, in construing and applying RFRA's compelling interest test, courts have almost always accorded prison officials the deference that Congress anticipated and, as a result, have rejected most RFRA claims brought by prisoners. Moreover, those claims that have been sustained under RFRA, in general,

have been the types of claims that likely would have been sustained under a rational-basis approach.

If RFRA is properly interpreted and applied to afford appropriate deference to prison administrators, its enforcement should not significantly exacerbate the costs and burdens associated with prisoner litigation and day-to-day prison administration. Although these *amici* might otherwise share the concerns of the *amici* states supporting the petitioner, RFRA should not cause the drastic consequences suggested in their brief. The case law already developed under the statute provides prison officials with a potent arsenal of decisions rejecting a wide variety of meritless claims under RFRA. These decisions can be used as a basis for seeking dismissal of, or summary judgment on, many if not most of the claims litigious prisoners are likely to assert. And, if the improbability of success proves insufficient by itself to deter frivolous claims, statutes such as the recently enacted Prisoner Litigation Reform Act of 1995 should diminish any incentive a prisoner might otherwise have to bring a meritless lawsuit under RFRA.

Nor is there any reason to believe that RFRA has undermined or will undermine the States' ability to manage their educational or public safety functions. For example, virtually all of the education-related cases that have been brought under RFRA have involved only ancillary issues of public education (such as sex education programs, graduations, etc.) and, even then, have been largely unsuccessful. The same is true of lawsuits involving issues of public safety.

In sum, while RFRA properly elevates religious freedom as a fundamental value throughout the Nation, when properly interpreted and applied, the Act does not hamstring the ability of States to perform their essential functions or to provide vital services. To be sure, the nuissance litigation arising out of the statute is an annoy-

ance to all States, but that inconvenience would exist without RFRA and, in any event, does not justify discarding RFRA and the important values underlying it.

ARGUMENT

Amici agree with the States that have joined in support of the petitioner that Section 5 of the Fourteenth Amendment is limited and narrow. However, the Religious Freedom Restoration Act is a valid exercise of Congress's authority under Section 5 under any of the narrow theories articulated in the briefs of the respondent, the United States, and RFRA's congressional sponsors. The Act also is not an unconstitutional attempt on the part of Congress to second-guess the Court as to the meaning of the Free Exercise Clause. Instead, the Act represents a determination by Congress that, assuming this Court's decision in *Employment Division* v. *Smith*, 494 U.S. 872 (1990), identified the maximum reach of the Clause standing alone, a somewhat broader statutory protection was necessary to ensure compliance with the Clause's core requirements. Accordingly, RFRA can and should be sustained without adopting or applying any of the broader theories of Section 5 discussed in the various briefs, including the "substantive" theory, the "ratchet" theory, or the "constitutional values" theory. And, for reasons articulated at length in the briefs filed by the respondent and its other *amici*, RFRA does not run afoul of the Establishment Clause.

Rather than burden this Court with another detailed analysis of the Act's constitutionality, this brief will address RFRA's implications for the management of state penal systems (in Section I below) and other state functions such as education and public safety (in Section II). RFRA has not been—and as long as RFRA is properly interpreted by this Court and the lower courts, it will not be—an undue or unworkable intrusion into state prerogatives.

I. PROPERLY INTERPRETED, RFRA DOES NOT AND WILL NOT UNDERMINE THE STATES' ABILITY TO RUN THEIR PRISONS.

With respect to prison management, RFRA requires courts to provide substantial deference to the States and to those responsible for administering the state penal systems. As demonstrated below, the necessity for such deference is strongly reflected in the case law establishing the well-settled principle that courts must provide significant deference to the States in matters of prison operations, as well as in RFRA's legislative history and in the case law interpreting and applying RFRA's provisions to specific religious-freedom claims. Moreover, as long as the lower courts continue to show appropriate deference to prison officials in addressing RFRA claims, and in applying such statutes as the recent Prison Litigation Reform Act, RFRA will not place undue burdens on State prison authorities.

A. RFRA's Language and Legislative History Require Substantial Deference to the States in Matters of Prison Operations, Including A Recognition that Prison Discipline, Order and Security are Necessarily "Compelling" Governmental Interests.

RFRA's language and legislative history make clear that, at least in the prison context, courts are to continue that tradition and afford significant deference to the States. RFRA provides that the government may not substantially "burden" a person's "free exercise" of religion unless the government demonstrates that the burden "(1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). This language derives from this Court's decisions in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), and their progeny. The limitations inherent in the requirement of proving a "substantial burden" preserves State authority in many in-

stances where RFRA may be invoked. Although the lower courts, prior to *O'Lone*, disagreed among themselves as to whether the *Sherbert/Yoder* compelling interest test applies to religious freedom claims in the prison context, even those courts that had applied that test accorded a great deal of deference to the judgments of prison administrators. In determining, as a statutory matter, that the compelling interest test should apply to religious freedom claims brought by prisoners, Congress evinced its intent—both implicitly in the language of the Act and expressly in the legislative history—to retain in place the deference that courts had traditionally paid to prison officials.

That lower courts applying the traditional *Sherbert/Yoder* approach to prisoners' religion claims (prior to *O'Lone*) would nevertheless give such deference to prison officials is hardly surprising in light of this Court's earlier decisions applying the Free Exercise Clause in the prison context. To be sure, the Court had long held that prisoners do not forfeit their constitutional rights, including those under the First Amendment, during periods of incarceration. *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979); *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974); *Cruz* v. *Beto*, 405 U.S. 319 (1972) (per curiam). Nevertheless, the Court also had established that incarceration carries with it certain unquestionably permissible limitations on the exercise of a prisoner's constitutional rights, *e.g.*, *Pell*, 417 U.S. at 822-23; *Procunier* v. *Martinez*, 416 U.S. 396, 412-13 (1974), *overruled on other grounds by Thornburgh* v. *Abbott*, 490 U.S. 401 (1989), and that prison officials must be given a great deal of deference in matters of prison administration, even when evaluating prisoners' First Amendment claims. See, *e.g.*, *Bell*, 441 U.S. 520; *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 128 (1977) (courts must give "appropriate deference to the decisions of prison administrators and appropriate recognition to the peculiar and restrictive circumstances of penal confinement"); *Wolff* v. *McDon-*

nell, 418 U.S. 539 (1974). In *Pell*, 417 U.S. at 827, this Court made clear that judgments regarding prison security "are peculiarly within the province and professional expertise of corrections officials, and . . . courts should ordinarily defer to their expert judgment." See also *Martinez*, 416 U.S. at 412 ("where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities").

Of course, prior to this Court's decisions in *O'Lone* and *Turner*, the lower courts were not consistent as to the standard that should be applied. Some courts applied a lenient balancing approach. See, *e.g.*, *Hill* v. *Blackwell*, 774 F.2d 338, 342-43 (8th Cir. 1985) (prisoner's free exercise claim); *Abdullah* v. *Kinnison*, 769 F.2d 345 (6th Cir. 1985) (same). Others applied a stricter, *Sherbert*-style, compelling interest test. See, *e.g.*, *Murphy* v. *Missouri Dep't of Corrections*, 814 F.2d 1252, 1256 (8th Cir. 1987) (prisoners' free speech and exercise rights); *Bradbury* v. *Wainwright*, 718 F.2d 1538, 1543 (11th Cir. 1983) (prisoners' free exercise rights); *Madyun* v. *Franzen*, 704 F.2d 954 (7th Cir. 1983) (same).[1] Even courts that applied the more stringent test in the prison context recognized that they must give substantial deference to prison officials. See *Martinelli* v. *Dugger*, 817 F.2d 1499, 1506 (11th Cir. 1987); *Bradbury*, 718 F.2d at 1532; *Weaver* v. *Jago*, 675 F.2d 116, 119 (6th Cir. 1982); *Vodicka* v. *Phelps*, 624 F.2d 569 (5th Cir. 1980).

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[1] *See also Martinelli* v. *Dugger*, 817 F.2d 1499, 1506 (11th Cir. 1987) (prisoners' free exercise rights); *Weaver* v. *Jago*, 675 F.2d 116, 118-19 (6th Cir. 1982) (same); *Vodicka* v. *Phelps*, 624 F.2d 569, 570-71 (5th Cir. 1980) (prisoner's free speech rights); *Kennedy* v. *Meacham*, 540 F.2d 1057 (10th Cir. 1976) (prisoner's free exercise rights); *Walker* v. *Blackwell*, 411 F.2d 23, 24-25 (5th Cir. 1969) (same); *Barnett* v. *Rodgers*, 410 F.2d 995, 1000 (D.C. Cir. 1969) (same); *Fortune Soc'y* v. *McGinnis*, 319 F. Supp. 901, 904 (S.D.N.Y. 1970) (prisoners' free speech rights); *Udey* v. *Kastner*, 805 F.2d 1218, 1219 n.1 (5th Cir. 1986) ("[w]e note that there is an intercircuit conflict on the appropriate standard for free exercise claims in a prison context").

This deference applied at two distinct levels. First, following this Court's statements in earlier decisions, the lower courts recognized that, in the prison context, order, safety, security and discipline are paramount government interests. See, *e.g.*, *Martinelli*, 817 F.2d at 1506; *Bradbury*, 718 F.2d at 1543. Second, those courts recognized that prison officials are entitled to great deference in determining whether a particular prison regulation is tailored with sufficient precision to the state interest at issue. *Martinelli*, 817 F.2d at 1506; *Bradbury*, 718 F.2d at 1543; *Weaver*, 675 F.2d at 118-19. In short, pre-*O'Lone* decisions, including those applying a *Sherbert*-style compelling interest test, accorded prison officials substantial deference at *both* steps of the *Sherbert* inquiry. See *Martinelli*, 817 F.2d at 1506 ("[t]his two-part standard should be applied with a wide-ranging deference to the expert judgment of prison administrators"); *Bradbury*, 718 F.2d at 1543 (same); see also *Weaver*, 675 F.2d at 118-19; *Vodicka*, 624 F.2d at 574.

The conflict regarding the proper standard for prisoners' First Amendment claims ultimately was resolved by the Court in *Turner* and *O'Lone*, which held that First Amendment claims by prisoners must be evaluated under a reasonable relationship standard rather than a compelling interest standard. In *O'Lone*, moreover, the Court once again emphasized that great deference must be given to those " 'who are actually charged with and trained in the running of the particular institution under examination.' " *O'Lone*, 482 U.S. at 349 (quoting *Bell*, 441 U.S. at 562).

In short, by the time RFRA was enacted, prior decisions of this Court and the lower courts firmly established the requirement that courts afford great deference to the views of prison officials, no matter what standard the courts apply to the prison regulation at issue. Although RFRA adopted—as a statutory matter—a stricter substantive standard than this Court ultimately was willing to adopt as a constitutional matter, Congress plainly agreed with

the Court on the importance of deference to prison officials. Indeed, in adopting the *Sherbert* test as the statutory standard for assessing prisoners' religious-freedom claims, Congress necessarily was adopting by implication the prior judicial directive that courts provide such deference in resolving those claims See, *e.g., Molzof* v. *United States,* 502 U.S. 301 (1992) (when term of art adopted in statute, term should be construed in accordance with its accepted meaning unless legislature indicates otherwise) (citing cases); *McDermott Int'l, Inc.* v. *Wilander,* 498 U.S. 337 (1991) (same).

In fact, if Congress intended to change the well-established concept that courts are to provide great deference to States in matters of prison administration, Congress would have had to express that intention clearly and unequivocally. As this Court stated in *Gregory* v. *Ashcroft,* 501 U.S. 452 (1991), "[I]f Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Id.* at 460-61 (quoting *Atascadero State Hosp.* v. *Scanlon,* 473 US. 234, 242 (1985)) (internal quotation marks omitted). Abandoning the tradition of deference to state prison officials would certainly alter that balance. Accord *Torcasio* v. *Murray,* 57 F.3d 1340, 1346 (4th Cir. 1995) ("[b]ecause the management of state prisons implicates 'decision[s] of the most fundamental sort for a sovereign entity,' Congress must speak unequivocally before [the court] will conclude" that Congress intended to change the balance between state and federal powers on prison-related issues) (quoting *Gregory,* 501 U.S. at 460, *cert. denied sub nom. Torcasio* v. *Angelone,* 116 S. Ct. 772 (1996)).

Congress not only failed to express an intention to take away the deference that was traditionally provided to the States, but explicitly declared an intention to the contrary.

For example, in its report on RFRA, the Senate Judiciary Committee stated:

> The Committee does not intend the act to impose a standard that would exacerbate the difficult and complex challenges of operating the Nation's prisons and jails in a safe and secure manner. Accordingly, the committee expects that the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with considerations of costs and limited resources.

S. Rep. No. 103-111, at 10 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1899-1900. And Senator Hatch expressly noted, without any disagreement from his colleagues, that "order, safety, and discipline" are compelling governmental interests in the prison context. 139 Cong. Rec. S14364 (daily ed. Oct. 26, 1993); see also 139 Cong. Rec. S14466 (daily ed. Oct. 27, 1993) (statement of Sen. Hatfield) ("[a]ctivities that are dangerous or jeopardize discipline would still be subject to restriction under the compelling interest standard"); S. Rep. No. 103-111, at 10, 1993 U.S.C.C.A.N. at 1900.

The conclusion that RFRA requires substantial deference to the judgments of prison officials finds further support in the history of a proposed amendment to RFRA, the Reid Amendment, that would have excluded prisoner claims from the Act's protection altogether The legislative history makes clear that, in rejecting this amendment, Congress did not intend to deprive prison officials of the deference they had received in the past. Instead, Congress intended to limit the possible effects of RFRA on prison management by defining "compelling interest" so that prison officials would almost always be able to justify prison regulations. See Abbott Cooper, "Dam the RFRA at the Prison Gate: The Religious Freedom Restoration

Act's Impact on Correctional Litigation," 56 Mont. L. Rev. 325, 333 (1995). Thus, the Senate Report stated:

> The committee is confident that the compelling interest standard established . . . in the Act will not place undue burdens on prison authorities. Instead, it reestablishes a standard that is flexible enough to serve the unique governmental interests implicated in the prison context. Accordingly, the committee finds that application of the act to prisoner-free exercise claims will provide a workable balancing of the legitimate interests of prison administrators with the Nation's tradition of protecting the free exercise of religion.

S. Rep. No. 103-111, at 11, 1993 U.S.C.C.A.N. at 1900.

Indeed, during the congressional proceedings, many prison and law-enforcement officials recognized that, even without the Reid Amendment, RFRA would preserve the deference they traditionally had been afforded, both by this Court and by the lower federal courts. Thus, although some state Attorneys General submitted a letter in support of the amendment, other state Attorneys General and the United States Attorney General submitted letters opposing the Amendment, in part on the ground that prison officials would continue to receive great deference under the new statute in any event. 139 Cong. Rec. S14351-52 (daily ed. Oct. 26, 1993). As Attorney General Reno wrote:

> Certainly, the strong interest that prison administrators and society in general have in preserving security, order, and discipline in prison will receive great weight in the determination whether the government meets the compelling interest test when there is a claim that exercise of religious rights is burdened and whether it has pursued the least restrictive means of doing so.

Id. at S14351.

In sum, RFRA's language and legislative history reflect and reinforce the longstanding judicial tradition that prison

officials be accorded great deference in determining what is necessary for maintaining order, safety, security and discipline in their prisons. Thus, on paper, RFRA provides no substantial impediment to the effective administration of prisons by the States or by the United States. What is more, as *amici* now show, in practice RFRA has not unduly disrupted the States in their efforts to maintain effective penal institutions while recognizing the legitimate religious freedom claims of prisoners.

B. In Practice, Courts Have Typically Accorded Great Deference to Prison Officials When Applying RFRA to Prisoners' Claims, and Have Interpreted the Requirements of RFRA Narrowly as Applied to Prisoners.

If the courts refused to accord deference to prison officials as required under RFRA, *amici* certainly would be concerned. For the most part, however, the lower court have heeded Congress's directive to afford prison officials significant deference when deciding claims brought by prisoners under RFRA. In such cases, the government interest is almost always found compelling, and the challenged rule is far more often than not found to be an adequately tailored means of promoting that interest. As a result, when properly applied, RFRA has not had any significant adverse effect on the States' ability to ensure discipline and order in their prisons.

Many decisions have expressly recognized that the Act requires the courts to give great deference to prison officials. In *Ochs* v. *Thalacker*, 90 F.3d 293 (8th Cir 1996), for example, the Eighth Circuit observed that RFRA's "legislative history urges courts to 'continue the tradition of giving due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with considerations of costs

and limited resources.'" *Id.* at 296 (quoting S. Rep. No. 103-111, at 10, 1993 U.S.C.C.A.N. at 1900).[2]

Similarly, in *Hamilton* v. *Schriro*, 74 F.3d 1545, 1554 (8th Cir.), *cert. denied*, 117 S. Ct. 193 (1996), the same court observed that "both pre-*O'Lone* Supreme Court case law and the relevant legislative history indicate that a court applying RFRA must give due deference to the expertise of prison officials in establishing regulations to maintain prison safety and security, even when the court applies a 'heightened' standard of review." After reviewing the history of this Court's, and the lower courts', treatment of prisoners' First Amendment claims, as well as RFRA's legislative history, the court concluded that "the necessity for courts to continue deferring to the judgment of prison officials" remains even under RFRA. *Id.*

Accordingly, in cases in which courts have reached the compelling interest and tailoring analyses,[3] they have

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[2] In *Ochs*, 90 F.3d at 295, the Eighth Circuit rejected a prisoner's request to be racially segregated. The court questioned the sincerity of the inmate's religious views and whether a sincere religious belief was "substantially burdened," but did not decide the case on those grounds. *Id.* at 296. Instead, the Court noted that it "must give great deference to these penological judgments regarding security" and held that the refusal to segregate racially the inmate was done "to further the most compelling government interest in a prison setting, institutional security." *Id.* at 297. The court also indicated that the prison officials "believe that random cell assignments lessen racial tension and promote security, and that no less restrictive policy can meet their security objectives." *Id.* at 296.

[3] In many cases, the courts have not even reached the compelling interest or the least restrictive means analyses because they first concluded that the inmates failed to satisfy the threshold requirement of proving a "substantial burden" on their free exercise rights. *See, e.g.*, *Bryant* v. *Gomez*, 46 F.3d 948 (9th Cir. 1995) (inmate failed to demonstrate that prison's refusal to hold full Pentecostal services substantially burdens his faith); *Diaz* v. *Collins*, 872 F. Supp. 353, 359-60 (E.D. Tex. 1994) (stipulations on obtaining medical pouch did not substantially burden inmate's free exercise rights); *Levinson-Roth* v. *Parries*, 872 F. Supp. 1439

most often concluded that there was no violation of RFRA because the government's interest was sufficiently compelling and the means chosen were permissible. See, *e.g.*, *Diaz* v. *Collins*, 872 F. Supp. 353, 358-59 (E.D. Tex. 1994) (hair length requirement did not violate RFRA); *Fawaad* v. *Herring*, 874 F. Supp. 350 (N.D. Ala. 1995) (prison requirement that inmate use "committed" name as well as religious name on all mail was not a violation of RFRA), *aff'd*, 81 F.3d 1084 (11th Cir. 1996); *George* v. *Sullivan*, 896 F. Supp. 895 (W.D. Wis. 1995) (denial of access to materials that fostered racial animosity not a violation of RFRA). Indeed, the courts have uniformly recognized that, "[i]n the prison context, compelling government interests include orderly and safe operation of prisons." *Rust* v. *Clarke*, 883 F. Supp. 1293 (D. Neb. 1995), *aff'd without op.*, 89 F.3d 841 (8th Cir.), *cert. denied*, 117 S. Ct. 398 (1996). See also *Woods* v. *Evatt*, 876 F. Supp. 756 (D.S.C.), *aff'd*, 68 F.3d 463 (4th Cir. 1995); *Muslim* v. *Frame*, 891 F. Supp. 226, 232. (E.D. Pa. 1995) (citing statement of Senator Hatch during RFRA debate that " 'order, safety, security and discipline' are compelling governmental interests in the prison context").

The courts have relied for this conclusion, not only on RFRA's legislative history, but also on this Court's pre-RFRA (and pre-*O'Lone*) decisions such as *Bell* v.

(D. Md. 1995) (requiring inmate to remove wig for identification picture did not substantially burden her free exercise rights); *Woods* v. *Evatt*, 876 F. Supp. 756 (D.S.C.) (conducting Muslim service in multipurpose building and requirement that prisoners register as Muslims before permitted to attend Muslim service did not substantially burden inmate's free exercise rights), *aff'd*, 68 F.3d 463 (4th Cir. 1995); *Crosley-El* v. *Berge*, 896 F. Supp. 885 (E.D. Wis. 1995) (conducting only a general Muslim religious service and not a separate Moorish service did not substantially burden inmate's free exercise rights). Like all litigation, these claims sap the resources of the State. Nevertheless, it is not reasonable to include such claims as part of the costs to the States of RFRA because they almost certainly would have been pursued without RFRA and their proper disposition was not affected by the Act.

Wolfish, 441 U.S. 520 (1979); see *id.* at 520-21, 544-48, and to prior lower court decisions that found prison security, discipline and administration "compelling interests by definition," see *George*, 896 F. Supp. at 898 (acknowledging that this Court has "repeatedly recognized that prison officials are better situated than judges to evaluate penological objectives" and that "there can be no argument that there is a compelling state interest in the security of the [prison]"); *Rust*, 883 F. Supp at 1306-07; *Frame*, 891 F. Supp. at 232 ("the government's interest in creating safe prisons certainly qualifies as a compelling interest;" " 'institutional considerations of internal security within the corrections facilities' are 'central to all other corrections goals' ") (quoting *Pell*, 417 U.S. at 822). In short, courts interpreting RFRA have been extremely (and appropriately) deferential to prison authorities as to what constitutes a compelling interest. See Daniel J. Solove, Note, "Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons," 106 Yale L.J. 459, 474-86 (1996) (arguing that courts have not been sufficiently skeptical of the government's interests and policies under RFRA).

In applying RFRA's tailoring requirement, courts have likewise accorded great deference to prison officials in determining whether the regulation at issue is sufficiently tailored to the State's objective. See *Jolly* v. *Coughlin*, 76 F.3d 468 (2d Cir. 1996); *Ochs*, 90 F.3d at 296-97; *Hamilton*, 74 F.3d at 1554, 1556; *George*, 896 F. Supp. at 898. Courts have acknowledged that

> It would be a herculean burden to require prison administrators to refute every conceivable option in order to satisfy the least restrictive means prong of RFRA. Moreover, such an onerous requirement would be irreconcilable with the well-established principle, recognized by the Supreme Court and RFRA's legislative history, that prison administrators must be accorded due deference in creating regulations and policies directed at the maintenance of prison safety and security.

Hamilton, 74 F.3d at 1556. Here, too, the courts have looked not only to RFRA's legislative history, but also to this Court's pre-RFRA (and pre-*O'Lone*) decisions in case such as *Bell*. See *Jolly*, 76 F.3d at 475-76; *Ochs*, 90 F.3d at 297; *Hamilton*, 74 F.3d at 1553; *George*, 896 F. Supp. at 898.

To be sure, prisoners have won some limited victories under RFRA. But those results might have been no different prior to RFRA, even under this Court's decisions in *O'Lone* and *Turner*. For example, in *Muslim* v. *Frame*, 891 F. Supp. 226 (E.D. Pa. 1995), the court denied the government's motion for summary judgment on a prisoner's RFRA claim regarding the wearing of a particular head gear on the ground that, in that case, prison officials had failed to establish that allowing a religious head gear would unduly increase administrative costs, permit a means of expressing gang affiliation or impede a need to visually identify prisoners. Yet a similar claim produced the same result in *Conley* v. *Branston*, No. 87-3692, 1988 WL 61509 (6th Cir. June 13, 1988) (unpublished op.) (per curiam) (reversing grant of summary judgment on prisoner's free exercise claim relating to the wearing of a headband), which was decided after *O'Lone* and prior to RFRA's enactment. In another case, the court in *Luckette* v. *Lewis*, 883 F. Supp. 471 (D. Ariz. 1995), held that a prisoner's request to maintain a beard of not more than one-quarter inch did not raise compelling safety concerns under RFRA. Yet, at least one court had reached a similar conclusion in another post-*O'Lone*, pre-RFRA case. See *Mosier* v. *Maynard*, 937 F.2d 1521 (10th Cir. 1991) (summary judgment denied on prisoner's free exercise claim regarding hair grooming).

Similarly, the plaintiffs in *Sasnett* v. *Sullivan*, 91 F.3d 1018 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3370 (U.S. Oct. 29, 1996) (No. 96-710), won a preliminary injunction preventing the application of a regulation banning the wearing of religious jewelry in prison until a final decision on the merits was made. But the plaintiff

in a case decided under the *O'Lone* standard also obtained a preliminary victory on a similar issue. See *Street* v. *Maloney*, No. 92-1822, 1993 WL 125396 (1st Cir. Apr. 23, 1993) (unpublished op.) (reversing summary judgment for prison officials on prisoner's challenge to confiscation of Hindu prayer bears).

As these cases demonstrate, the mere fact that prisoners win a few victories under RFRA need not signal a radical departure from the deference afforded to prison officials prior to RFRA. In any event, this Court and other appellate courts around the country obviously can correct any excesses committed at the trial court level.

In the view of the States that join as *amici* herein, this analysis places in proper context the "parade of horribles" showcased by the *Amici* States in support of the petitioner. *Amici* Brief at 4-5 (citing cases). Many of the prisoner claims discussed by those States are, indeed, ridiculous. What is telling, however, is that each of those claims—for racial segregation, permission to distribute hate literature, permission to distribute drugs, the right to burn bibles, the right to obtain swords, etc.—was *rejected* by the courts under RFRA. Consistent with RFRA's language and legislative history, those decisions reflect the proper understanding that prison administrators are entitled to substantial deference as to both "compelling interest" and what constitutes the "least restrictive means" of furthering that interest.

C. Properly Interpreted by the Courts to Grant Appropriate Deference to Prison Administrators, RFRA Should Not Impose Undue Additional Costs or Intrusion Upon the States.

If, as the Senate Judiciary Committee anticipated, "the courts will continue the tradition of giving due deference to the experience and expertise of prison and jail administrators," see S. Rep. No. 103-111, at 10, 1993 U.S.C.C.A.N. at 1900, RFRA should not visit undue costs or intrusion upon the administration of prisons.

The States supporting the petitioner argue that the Act unduly burdens States because "RFRA lawsuits are expensive." *Amici* Brief at 3. That argument would have validity only if courts misapplied RFRA.

Doubtless, some lower courts have failed to afford the appropriate deference to prison administrators under RFRA, and such cases have resulted in increased costs of litigation and compliance. As shown above, however, most courts applying RFRA in the prison context have accorded administrators the "wide-ranging deference" that this Court sanctioned in *Bell*, 441 U.S. at 547, and recently reaffirmed in *Lewis* v. *Casey*, 116 S. Ct. 2174, 2185, 2198 (1996) (quoting *Bell* with approval in both the majority opinion and the concurrence of Justice Thomas). See, *e.g.*, *Ochs*, 90 F.3d at 296; *Hamilton*, 74 F.3d at 1554-55. See also *supra* pp. 7-8. To the extent the Court in the present case considers the issue of RFRA's application in the prison context, the Court should recognize that the lower court decisions providing deference to prison administrators have interpreted and applied RFRA correctly.

Even granting that, if applied improperly, RFRA could be expensive and intrusive to the States, the *Amici* States supporting the petitioner overlook three important considerations. First, religious freedom cases would impose significant costs on the States with or without RFRA. Although it is true that a large number of cases brought under RFRA have been by prisoners, prisoners brought numerous religious freedom challenges before RFRA was enacted as well. Certainly, the abundance of prisoner lawsuits is a burden on State governments, but that burden is not new, and did not result from RFRA. Similarly, although prison officials face significant challenges every day in attempting to accommodate prisoners' religious practices, with many of the issues never even reaching the courts, that administrative burden would exist regardless of RFRA.

Likewise, although a number of the prisoners' claims under RFRA have been meritless, many of the pre-RFRA religious freedom challenges by prisoners were meritless as well.[4] As Attorney General Reno wrote in opposition to the Reid Amendment:

> Prisons had operated under Sherbert for a number of years before O'Lone and Turner adopted a standard that is plainly less accommodating to the prisoners' exercise of religious rights. During that period, prisoners attempted to gain privileges based on fabricated free exercise claims. Not surprisingly, those types of claims have continued even under the standard of O'Lone and Turner. They will doubtless continue whether [RFRA] becomes law or not.

139 Cong. Rec. S14351 (daily ed. Oct. 26, 1993).

In any event, as the Judiciary Committee anticipated, courts have been able to discern and reject sham Free Exercise claims that are, in fact, "designed primarily to obtain special privileges." S. Rep. No. 103-111, at 10-11, 1993 U.S.C.C.A.N. at 1899-1900. In such cases, courts have rejected the claims outright by applying the threshold substantial burden test, without even reaching the compelling interest/narrow tailoring tests. Thus, Senator Hatch was correct when he stated that "our courts are well suited to detect the abusive tendencies of our litigious prisoners," and his hope that "the courts will continue to reject these abusive claims. . . . [and that] the courts will continue to deny protection to prisoners involved in

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[4] For example, in *Green* v. *White*, 525 F. Supp. 81 (E.D. Mo. 1981), *aff'd*, 693 F.2d 45 (8th Cir. 1982), the court three times dismissed the claims of a prisoner, the spiritual leader of the Human Awareness Life Church, for various privileges, including conjugal visits, banquets on designated church holidays and payment for services as chaplain of his church. The court dismissed the prisoner's lawsuit, recognizing "the complete and total insincerity of plaintiff and his litigious pursuits" and noting that "[i]t was readily apparent to any objective observer that [plaintiff] viewed the proceedings in this Court as a joke." *Id.* at 85.

this deceitful activity" has come true. 139 Cong. Rec. S14362 (daily ed. Oct. 26, 1993) (statement of Sen. Hatch).

Second, the arguments by the petitioner and its *amici* fail to recognize that much of the litigation cost to the States results from the fact that RFRA is a relatively new statute, and that those additional costs soon will be reduced greatly as the body of precedent favorable to States under RFRA develops. Already, in the few years since RFRA was enacted, a fairly substantial body of case law has established, among other things, that a prisoner's religious beliefs do not entitle him or her to:

- Obtain access to materials that foster racial animosity. *George* v. *Sullivan*, 896 F. Supp. 895 (W.D. Wis. 1995); *Reimann* v. *Murphy*, 897 F. Supp. 398 (E.D. Wis. 1995); *Haff* v. *Cooke*, 923 F. Supp. 1104 (E.D. Wis. 1996).
- Live in racially segregated quarters. *Ochs* v. *Thalacker*, 90 F.3d 293, 295-96 (8th Cir. 1996); *Winters* v. *State*, 549 N.W.2d 819 (Iowa 1996).
- Be excluded from mandatory testing for various diseases. *Rhinehart* v. *Gomez*, No. 93-CV-3747, 1995 WL 364339 (N.D. Cal. June 8, 1995); but see *Jolly* v. *Coughlin*, 76 F.3d 468 (2d Cir. 1996).
- Choose a prison with better quality religious services or religiously prepared (*e.g.*, kosher) food. *Prins* v. *Coughlin*, 76 F.3d 504 (2d Cir. 1996).
- Attend religious services without first signing up to attend. *Shaheed* v. *Winston*, 885 F. Supp. 861 (E.D. Va. 1995).
- Attend religious services designed for a particular sect within a broader denomination, where the prison already offers services designed for the entire denomination. *Crosley-El* v. *Berge*, 896 F. Supp. 885 (E.D. Wis. 1995) (no right to attend Moorish Science Temple services separate from general "Islamic" services); *Bryant* v. *Gomez*, 46 F.3d

948 (9th Cir. 1995) (inmate failed to demonstrate that prison's refusal to hold full Pentecostal services substantially burdens his faith); see also *Blair-Bey* v. *Nix*, 963 F.2d 162, 163 (8th Cir. 1992) (religious advisor need not be provided for particular sect of Islamic religion).

- Wear religious clothing particular to a specific sect within a broader denomination. *Akbar-El* v. *Muhammed*, 663 N.E.2d 703 (Ohio Ct. App. 1995) (no right to wear a "fez" rather than an officially sanctioned "tarbush" for Islamic services).
- Wear long hair or a wig. *Hamilton* v. *Schriro*, 74 F.3d 1545 (8th Cir. 1996); *Diaz* v. *Collins*, 872 F. Supp. 353 (E.D. Tex. 1994); *Phipps* v. *Parker*, 879 F. Supp. 734, 736 (W.D. Ky. 1995); *May* v. *Baldwin*, 895 F. Supp. 1398 (D. Or. 1995); *Levinson-Roth* v. *Parries*, 872 F. Supp. 1439 (D. Md. 1995).

The ever-growing list of requested privileges to which prisoners are *not* entitled under RFRA provides courts with precedent that will undoubtedly make future cases even easier to handle. Courts that address similar issues in the future properly will reject such claims in response to motions to dismiss, or certainly in response to summary judgment motions, at least in part based on these earlier rulings.[5]

Third, in any event, the argument with respect to the States' litigation burden ignores the additional limitations that Congress recently has placed on prisoner lawsuits in the Prison Litigation Reform Act of 1995, Pub. L. No.

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[5] Already, courts have granted summary judgment on the grounds that the inmate's free exercise rights have not been substantially burdened. *See, e.g., Crosley-El*, 896 F. Supp. at 889; *Woods*, 876 F. Supp. at 756. Similarly, courts have started to find as a matter of law that the governmental interests are compelling, *see, e.g., Frame*, 891 F. Supp. at 232, and that the means chosen by the State were the least restrictive alternatives, *see, e.g., George*, 896 F. Supp. at 898.

104-134, Title VIII, §§ 801-810, 110 Stat. 1321-66 to 1327-77 (1996). That legislation provides that a prisoner bringing a civil action on an *in forma pauperis* basis nevertheless must pay the full amount of the filing fee, and provides the mechanism by which the court can enforce this requirement against the prisoner. See *id.*, § 804. The legislation further provides that, for any claim brought by a prisoner against a government entity or employee thereof, the court should "before docketing, if feasible, or, in any event, as soon as practicable after docketing, . . . dismiss the complaint, or any portion of the complaint, if the complaint—(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." *Id.*, § 805. Moreover, the legislation provides that no prisoner may bring a civil action on an *in forma pauperis* basis if the prisoner has previously brought three actions found to be frivolous, malicious or failing to state a claim. See *id.*, § 804.

Perhaps most important, the legislation provides that release credit, *i.e.*, "good time," earned by a prisoner may be revoked if a court finds that the prisoner has brought a civil action and "(1) the claim was filed for a malicious purpose; (2) the claim was filed solely to harass the party against which it was filed; or (3) the claimant testifies falsely or otherwise presents false evidence or information to the court." *Id.*, § 809.

This legislation thus provides an additional means of ensuring that prisoners are not able to bog down the justice system and burden the States with meritless claims under RFRA or any other authority. Prisoners certainly will become more hesitant to file frivolous or malicious claims when they realize they will have to pay filing fees, that the claims may be dismissed even before they are docketed, and that they may lose earned release credits if a court finds that the claims were made maliciously—as

a court is likely to do if the prisoner brings a claim under RFRA that has already been rejected.

In sum, as long as the courts interpret RFRA in a manner that affords appropriate deference to prison officials, there is no good reason to believe that RFRA either will interfere with the States' ability to administer their prisons, or will increase the cost of responding to prisoner litigation. The States joining this brief share completely the desire of those States supporting the petitioner to ensure that prison administration is not undermined by RFRA or that undue resources are not devoted to defending senseless litigation involving meritless assertions of religious freedom. Where we part company with our sister States is on the issue of whether those objectives can be preserved under RFRA. We believe they can, and in any event, the record to date simply does not reveal the kind of untoward effects on States that would justify abandoning the core value of promoting religious freedom.

II. RFRA DOES NOT IMPEDE THE STATES' ABILITY TO MANAGE THEIR EDUCATIONAL OR PUBLIC SAFETY FUNCTIONS.

The States supporting the petitioner properly identify prisoner actions as the primary source of concern arising out of RFRA, and these *amici* believe the above discussion adequately addresses that common concern. To a lesser extent those States also express some anxiety about the impact of RFRA on the administration of their educational, public safety and other core functions. Again, the States joining this brief could not more strongly agree that these are matters of fundamental importance and that they must guide the proper interpretation of RFRA. However, as shown below, the valid interests of the States can be accommodated within the statutory framework. Accordingly, the argument for jettisoning RFRA on radical constitutional grounds cannot be supported by reference to argument based on the need to protect State policymaking prerogatives.

Although there have been a number of cases under RFRA relating to education, the cases reveal no interference with the States' ability to provide public education effectively and efficiently. In fact, plaintiffs have lost many of the cases challenging education-related regulations or practices.[6] Remarkably, in none of the cases cited by the *Amici* States in support of the petitioner, was a violation of RFRA found.[7] *Amici* Brief at 6. Moreover, the education cases under RFRA have involved issues that were tangential to the State's core mission in providing public education to children; none has even challenged a regulation the invalidation of which would interfere in any significant way with any State's ability to operate its public education system.

Similarly, although some of the claims made under RFRA arguably are related to issues of "public safety," none of those cases has created any new rights or allowed plaintiffs any special privileges. As with the education cases, not one of the public safety cases cited by the States in support of the petitioner found a violation of RFRA.[8] *Amici* Brief at 7. Thus, the courts properly

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[6] See, *e.g.*, *Bauchman* v. *West High Sch.*, 900 F. Supp. 254 (D. Utah 1995) (Jewish student's challenges to various practices at her public school, including singing religious songs at graduation, dismissed); *Brown* v. *Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995), (high school students' challenges to requirement that they attend AIDS/sex education program at public school dismissed), *cert. denied*, 116 S. Ct. 1044 (1996); *Goodall* v. *Stafford County Sch. Bd.*, 60 F.3d 168 (4th Cir. 1995) (no violation in refusal to provide hearing-impaired child with cued speech translator in his private sectarian school), *cert. denied*, 116 S. Ct. 706 (1996).

[7] In each of the cited cases except one, the plaintiff's claim was rejected. In the exception, *Cheema* v. *Thompson*, 67 F.3d 883, 886 (9th Cir. 1995), the plaintiff merely won a preliminary injunction effective until a decision on the merits was reached; the court did not find a violation of RFRA.

[8] For example, in *State* v. *Bontrager*, No. 6-95-16, 1996 WL 612397 (Ohio Ct. App. Oct. 18, 1996) (unpublished op.), the defendant was convicted of violating the criminal code for deer

have recognized that RFRA is not a vehicle by which to interfere significantly with the States' ability to address issues of public safety, and there is no reason to assume that the courts will do so in the future.

Finally, RFRA has not created burdensome problems for the States on land-use issues. The States supporting the petitioner cite only one case involving a land-use issue, and the plaintiffs' RFRA claim in that case was rejected.[9] *Amici* Brief at 7. Courts have rejected the RFRA claims in other land-use cases decided under RFRA as well.[10] And the few land-use claims under

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hunting while not wearing a "hunter orange" colored hat, cap, vest or jacket. The defendant, a member of the Old Order Amish faith, claimed that enforcement of that law against him would violate his rights under the United States and Ohio constitutions. On appeal, the court affirmed the conviction, and found that the statute violated neither the state constitution nor federal law under either *Smith* or RFRA. *Id.* at *6-*7; *see also Osborne* v. *Power*, 890 S.W.2d 570 (Ark. 1994) (no violation of RFRA in finding that massive display of Christmas lights on private home was a nuisance that must be abated). In the one case cited by the States supporting the petitioner in which the court found a constitutional violation, the court concluded that the challenged statute violated the state constitution as applied in the case and on that basis declined even to address the applicability of RFRA. *State* v. *Miller*, 549 N.W.2d 235 (Wis. 1996).

[9] In *Thiry* v. *Carlson*, 78 F.3d 1491, 1494-96 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 78 (1996), the plaintiffs claimed that a proposed condemnation of a portion of their property violated RFRA because that poriton of their property contained the gravesite of their stillborn daughter. The court found no substantial burden on their exercise of religion and, therefore, no violation of RFRA. *Id.* at 1495-96.

[10] *See, e.g., Daytona Rescue Mission, Inc.* v. *City of Daytona Beach*, 885 F. Supp. 1554 (M.D. Fla. 1995) (denial of mission's application to operate shelter and food bank not a substantial burden under RFRA); *Germantown Seventh Day Adventist Church* v. *City of Philadelphia*, No. CIV.A. 94-1633, 1994 U.S. Dist. LEXIS 12163 (E.D. Pa. Aug. 26, 1994) (no showing that zoning restrictions caused substantial burden on religious freedom).

RFRA that have succeeded do not involve issues that will interfere in any substantial way with a State's ability to regulate land-use matters.[11]

In sum, any argument that RFRA will seriously impede the States' ability to carry out their educational, public-safety, land-use, and other functions rests on unfounded speculation and hyperbole. The growing body of case law under RFRA demonstrates that the States have rarely even been faced with significant *challenges* to their ability to carry out those core functions, much less court decisions that threaten those functions in any significant way.

Given that this is a brief filed on behalf of States, it bears repeating that *amici* share the underlying concerns of those States that have joined in support of the petitioner. Like those States, the States here are wary of any federal legislation that interferes with our ability to perform core functions, such as operating prisons, schools and other institutions efficiently and effectively. But fear and suspicion are no substitute for a reasoned and honest assessment of the costs and benefits of a particular federal enactment.

Such an assessment of RFRA demonstrates that the Act protects religious freedom, which the *amici* States joining this brief recognize as fundamentally important, and does so without interfering significantly with the States' prerogatives in furthering their important missions. Thus, *amici* remain committed to ensuring that Congress does not run afoul of the limits on its authority under the Fourteenth Amendment and elsewhere in the

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[11] *See, e.g., Western Presbyterian Church* v. *Board of Zoning Adjustment*, 862 F. Supp. 538 (D.D.C. 1994) (summary judgment and permanent injunction for church that wanted to feed the homeless; city had not demonstrated a compelling interest); *Jesus Center* v. *Farmington Hills Zoning Bd. of Appeals*, 544 N.W.2d 698 (Mich. Ct. App. 1996) (violation of RFRA in not permitting church to operate homeless shelter; interest compelling but means not least restricitve).

Constitution. But whatever those limits are, they are not exceeded by the measured effort to enforce religious freedom embodied in RFRA.

CONCLUSION

For the foregoing reasons, these *Amici* States respectfully request that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

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